

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BERTHA M. PEREZ** )  
Claimant )  
VS. )  
**HALLMARK CARDS, INC.** )  
Self-insured Respondent )

Docket No. 1,017,799

**ORDER**

Claimant requested review of the May 17, 2007, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict. Jack A. Kaplan, of Topeka, Kansas, appeared for claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) denied claimant the requested medical treatment, relying upon the authorized treating physician's opinion that claimant was not in need of treatment.

The record is the same as that considered by the ALJ and consists of the transcript of the May 16, 2007, Preliminary Hearing and exhibit, the transcript of the March 8, 2006, Preliminary Hearing and exhibits, and the transcript of the September 15, 2004 Preliminary Hearing and exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant contends she is entitled to medical treatment. She argues that Dr. Edward Prostic, the last physician to examine her, stated that she needed additional treatment.

Respondent has filed a motion to dismiss claimant's application for review, arguing that the Board does not have jurisdiction over this matter pursuant to K.S.A. 44-534a. In the alternative, respondent argues that claimant's treating physician as well as Dr. Joseph Mumford have refused to treat claimant because they both believe that claimant is not in need of further treatment.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction of this appeal from a preliminary order?

(2) If so, does claimant need further medical treatment?

#### FINDINGS OF FACT

Claimant injured her left shoulder at work on June 25, 2003. Her authorized treating physician, Dr. Craig Vosburgh, performed rotator cuff surgery on her left shoulder. Thereafter, claimant alleged ongoing right shoulder problems. After a preliminary hearing on March 8, 2006, the ALJ found that claimant did not suffer an accidental injury and denied her request for medical treatment. That preliminary Order was reviewed by a Board Member who reversed the ALJ and found that claimant had bilateral shoulder problems which emerged over time from her work. The Board Member granted claimant's request for medical treatment for her right shoulder with Dr. Vosburgh. However, Dr. Vosburgh refused to treat claimant, stating that he did not believe "that any additional treatment or surgery is indicated for either the right or left shoulder."<sup>1</sup> Claimant then requested that she be seen by Dr. Joseph Mumford. Dr. Mumford requested that he be allowed to review claimant's medical records before agreeing to see her. After a review of those records, Dr. Mumford advised respondent's attorney that he did not think he had anything to offer claimant. Claimant then requested medical treatment by an authorized treating physician, which the ALJ denied.

#### PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of

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<sup>1</sup> P.H. Trans. (May 16, 2007), Resp. Ex. 1.

whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,<sup>2</sup> the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>3</sup>

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>5</sup>

### ANALYSIS

The ALJ denied claimant's request for preliminary benefits because he determined she was not in need of additional medical treatment. The issue of whether a worker is in need of medical treatment is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker needs medical treatment is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

### CONCLUSION

An ALJ has the jurisdiction and authority to grant or deny medical benefits at a preliminary hearing. The ALJ did not exceed his jurisdiction by denying claimant additional medical treatment. This appeal does not give rise to any of the issues that are deemed

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<sup>2</sup>*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>3</sup>See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

<sup>4</sup>K.S.A. 44-534a.

<sup>5</sup>K.S.A. 2006 Supp. 44-555c(k).

jurisdictional by K.S.A. 44-534a(a)(2). Accordingly, the Board does not have jurisdiction to address the issue raised in this appeal at this juncture of the proceedings.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the claimant's appeal is dismissed and the preliminary Order of Administrative Law Judge Bryce D. Benedict dated May 17, 2007, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2007.

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BOARD MEMBER

c: Jack A. Kaplan, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge